No. 1008 (21)

FILED
MAR 2 1945
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

T. FRANK DOLAN, JR., LAURENCE SOVIK and MERCHANDISE BROKERAGE CORPORATION,

Petitioners,

vs.

ROBERT R. MEYER and MOKAVA CORPORATION,

Respondents.

In Proceedings for the Reorganization of The Onondaga Hotel Corporation, No. 27,263.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To avoid repetition, three petitioners are joined. Petitioners Dolan and Sovik will be called "Dolan." Respondents will be called "Meyer." The issues as to these parties are the same. The issues as to Petitioner, Merchandise Brokerage Corp., while different, arises out of the same proceedings and repetition will be avoided by including it in this petition.

SUMMARY STATEMENT OF MATTER INVOLVED

On Jan. 16, 1939, Debtor filed its petition for reorganization under Chapter X of the Bankruptcy Act (F. 52). The liabilities of Debtor were as follows:

A. First mortgage of $364,000 with unpaid interest from April 10, 1937 (acquired by Dolan in July, 1943) on the "Main Hotel Building" (F. 259).

B. First mortgage of $190,000 with unpaid interest from May 1, 1937, on the "Annex" adjoining the main building, the two forming one structural hotel building. This mortgage was originally given to the First Trust & Deposit Co. (hereinafter called "First Trust"), in 1928, the mortgage being the usual New York State short form, containing no trust provisions or mention of participation certificates (F. 89-103). The First Trust sold undivided shares in this mortgage to various persons in various amounts (F. 644-8), issuing as evidence thereof so-called participation certificates (hereinafter called "Participations") (F. 120). On the commencement of these proceedings the owners of these "Participations" filed the usual proof of claim in bankruptcy (F. 656-60) and at all times have been parties to these proceedings.

C. A second mortgage of $233,000 with unpaid interest from Oct. 1, 1936, on the "Main Hotel Building," to secure Second Mortgage Bonds (hereinafter called "Bonds") in that amount now outstanding.

D. Merchandise Brokerage Corporation, the only unsecured creditor remaining unpaid, $4,603.00 (F. 220, 569).

(The capital stock was eliminated through an insolvency trial.)

Through options acquired on stock in 1938, Meyer caused the reorganization petition to be filed (F. 533). He also purchased Bonds from time to time, so that on Feb. 14, 1944, he owned about $53,000 of Bonds (F. 534). (Feb. 14, 1944, was the day of the first hearing on the plan in question.)

In addition to said first mortgage of $364,000 on the "Main Hotel Building" acquired by Dolan in July, 1943, he also purchased, prior to Feb. 14, 1944, $45,000 of Bonds and $30,252 of "Participations" in said first mortgage on the "Annex" (F. 527).

On April 20, 1942, upon notice to Meyer and all other interested parties, the Court fixed the time and place for a hearing "on the matter of classification of creditors and stockholders and the priority of mortgage liens" (F. 554). No order was made fixing such classification and priority until nearly a year later (April 12, 1943) because of a dispute between Bondholders and "Participation" holders as to which mortgage was a first lien on the "Annex." This controversy was determined in favor of "Participation" holders by the District Court on Jan. 15, 1943.

The Trustee filed his plan on April 7, 1943. Meyer, controlling about two-thirds of the stock, was a proponent of this plan (Appendix, p. ~~39).~~ 51, infra)

On April 12, 1943, the District Court made its order, classifying these two first mortgages in the same class. Meyer was not only a party in that proceedings, but was also a proponent.

On April 26, 1943, a motion was made on notice to all interested parties, including Meyer, to amend that order and place the "Participation" holders in a separate class and remove any doubt as to their right to vote. The District Court denied the motion that they should be in a separate class, but held that they—not the First Trust—had the right to vote on any plan (F. 566). An order was accordingly made on April 30, 1943, and due notice thereof given to all interested parties, including Meyer. Meyer,

being a proponent of this holding, naturally was satisfied. No appeal was taken from this order and it became the law of the case.

Dolan bought the first mortgage on the "Main Hotel Building" with full knowledge of that classification order. That mortgage represented 65.7% of that class. To control that class it was necessary for Dolan to acquire some "Participations." Dolan therefore purchased "Participations" amounting to $30,252 (F. 527) to be in a position to vote in excess of 66⅔% of that class.

Dolan then filed amendments to the Trustee's plan. Meyer also filed amendments at the same time (F. 239). The plan and these amendments came on for hearing on Feb. 14, 1944.

After the hearing and before the matter was determined by the Court, Dolan made further amendments to satisfy the First Trust, the owner in a fiduciary capacity as trustee, guardian, etc., of practically all of the "Participations" except those held by him. (F. 271, 360)

The Bondholders were entirely satisfied with the provisions made for them (F. 272). Thus everyone was satisfied with the plan, except Meyer, and Meyer merely filed a general objection that the plan "failed to comply with the provisions of Sec. 216 of the Bankruptcy Act (and was not) fair, feasible or equitable" (F. 229).

On March 18, 1944, the Trustee's plan, as amended by Dolan's proposals, was approved (F. 238). Notice of a hearing to be held April 10, 1944, to consider the confirmation of the plan was mailed March 25, 1944 (F. 273).

(The issuer of these "participations")

5

Meyer, in order to block the confirmation of Dolan's plan, had to find some way to vote all the "Participations" because Dolan owned $30,252 of them, which, together with the first mortgage on the Main Building, exceeded 66⅔% of that class, so six days later, on April 1, 1944, Meyer served an instrument on the First Trust under Sec. 275 of the New York Real Property Law, demanding an assignment of the whole mortgage and tendering the balance due thereon (F. 83, 128). (He had failed in previous attempts to buy the mortgage even on offer of the full amount due (F. 398)). For whatever it was worth, the First Trust accepted the tender and gave Meyer an instrument, reciting the demand and tender and assigning the mortgage upon the condition that it be approved by the District Court, not only as to "legality," but also as to "propriety," and specifically making reservation that it should—"not violate the rights of any participation certificate holders" (F. 85).

The matter was heard on April 10, 1944, the same day as the hearing on confirmation of the plan. Meyer claimed that as a result of the above transaction with the First Trust he was the owner of the mortgage; that he—not the "Participation" holders—was entitled to vote; that Dolan, therefore, was not entitled to vote his own "Participations" and accordingly there was not a two-thirds vote of that class. The District Court held that the demand was a "nullity"; that the First Trust was not compelled to assign the mortgage; that the assignment did "not deprive the owners of participation certificates who had not on April 10, 1944, been paid nor had payment tendered to them for their certificates with interest, of their right to vote upon or participate in the plan * * *" (F. 196). On that day no "Participations" had been paid, nor had payment been tendered to them. (F. 169)

The District Court permitted Dolan to vote his mortgage of $364,000 on the Main Building and his "Participations" amounting to $30,252 for the plan, and that being in excess of 66⅔% of that class, the plan was confirmed.

On appeal the Second Circuit has reversed the District Court in an opinion by Judge Jerome N. Frank, among other things, stating: F. 681

> "1. The lumping together, in one class, No. 7, of the two first mortgages was erroneous. That order was entered when the present plan was not before the court. We need not, therefore, consider whether a failure to appeal from a classification order, entered when a plan is before the court, precludes a later appeal from the order approving a plan, challenging the fairness of that plan, which raises the validity of the classification order. The error here was aggravated when the court approved a plan according very substantially different treatment of the two mortgages"

and that the assignment by the First Trust to Meyer—

F. 683

> "at once divested most of the certificate holders, including Dolan, of any interest in the mortgage * * * (and) There was nothing wrong in the fact that Meyer's purchase of the Annex Mortgage * * * prevented Dolan from getting control through an erroneous classification order.
>
> F. 685 Accordingly, the District Court erred in its order allowing the acceptances of the certificate holders to be counted and in refusing to consider Meyer's vote against the plan."

The Circuit Court has also reversed the District Court because of an issue involving the Second Mortgage Bonds, and also on the ground that full provision was made to the Merchandise Brokerage Corp., the only unsecured creditor, without the same provision being made to Bondholders. We will discuss these points under Subdivision 1 of "Reasons for Writ," infra.

REASONS RELIED UPON FOR THE WRIT

(These will be discussed separately infra)

(1-A) The Circuit Court has reversed an order of classification previously made by the District Court on an appeal from an order of confirmation when no appeal had been taken from that order of classification. This conflicts with the decision of the Seventh Circuit in *In re Austin Bldg. Corp.*, 96 Fed. (2d) 905.

(1-B) The reversal of the District Court on the ground that classifying the two first mortgages in the same class was erroneous, is in conflict with the decision of the Seventh Circuit in *In re Palisades-On-The-Desplaines*, 89 Fed. (2d) 214.

(1-C) The Circuit Court considered on this appeal issues which were not litigated in the District Court, or even brought to that Court's attention. While no one will disagree that such is the general rule, there may be doubt as to its application in reorganization cases. If so, it is in conflict with the decision of the Seventh Circuit in *In re Waern Bldg. Corp.*, 145 Fed. (2d) 584.

(1-D) The Circuit Court has reversed the District Court on the ground that "other" Bondholders did not receive notice. (The fact is they did receive notice. This will be discussed in Sub. 3 infra.). However, the decision of the

Circuit Court on this point is in conflict with the holding of the Ninth Circuit in *In re Mason v. Eldorado Irrigation District*, 144 Fed. (2d) 189, and with the decision of the Fourth Circuit in *In re Pullman Coach Co. v. Eshelman, et al.*, 1 Fed. (2d) 885.

(1-E) The Circuit Court has held that the order of classification must be made when a plan of reorganization is before the court. That holding is in conflict with the decision of the Fifth Circuit in *In re Texas Hotel Securities Corp.*, 87 Fed. (2d) 395.

(1-F) The Circuit Court has reversed the District Court on the ground that the successor in interest of issuer of "Participations" is entitled to vote the claim, i.e.—that Meyer, as successor in interest to the First Trust, the issuer of the "Participations," was entitled to vote the mortgage even though the "Participation" holders were the "creditors" who had filed the claims. This is in conflict with the decision of the Third Circuit in *Herbert v. Apartments Corp.*, 98 Fed. (2d) 662 (cert. den., 305 U. S. 640).

2. In making its decision that classifying the two first mortgages in one class was erroneous and citing *Group of Investors v. Milwaukee R. Co.*, 318 U. S. 523, 562, and *Ecker v. Western Pac. R. Corp.*, 318 U. S. 448, 482, the Circuit Court has erroneously interpreted applicable decisions of this Court.

3. The Circuit Court has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision, by reversing the District Court on the following issues which were never raised or brought to the attention of the District Court:

A. The "lumping" together of the two first mortgages in one class.

B. That the classification order was entered when the present plan was not before the court. (The facts are to the contrary. The present plan as amended was before the court (F. 239).)

C. That because of the alleged erroneous classification, Meyer, through his maneuver with the First Trust, was entitled to vote Dolan's "Participations."

D. That no hearing was had to evaluate the bonds.

E. That "other" Bondholders had no notice of the hearing regarding the evaluation of the bonds.

F. That the claim of Merchandise Brokerage Corp. was not entitled to full provision without the same provision being made to Bondholders.

4. The Circuit Court has decided important questions of bankruptcy law which have not been, but should be, settled by this Court, many of which questions are both novel and important.

5. This reversal of the District Court by the Circuit Court is palpably erroneous on its face.

6. The Bankruptcy Act and the general principles of equity jurisprudence have been so construed and applied by the Circuit Court as to permit a miscarriage of justice.

REASONS RELIED UPON FOR THE WRIT

I.

The decision of the Second Circuit Court of Appeals is in conflict with decisions of other Circuit Courts on questions of Federal Bankruptcy Law.

(1-A) The Second Circuit Court in the instant case has stated: F. 681

> "The lumping together in one class * * * of the two first mortgages was erroneous."

In so saying the Second Circuit is in effect reversing on this appeal the order of classification made Apr. 30, 1943, from which no appeal had been taken. In fact, the issue was never even raised before the District Court. At no time in the District Court did Meyer complain that the two first mortgages should not be in the same class. In fact, his maneuver with the First Trust was predicated on the proposition that the mortgages would be in one class and that he, if he could acquire the vote of all "Participations," would preclude Dolan from voting two-thirds of that class.

Assuming for the moment, therefore, that the issue had been raised, which indeed it had not been, the decision of the Second Circuit is in conflict with the decision of the Seventh Circuit in *In re Irving-Austin Bldg. Corp.*, 96 Fed. (2d) 905, where an order of classification previously made was attacked on appeal from an order of confirmation. There the court said:

> "The court had already entered the order of classification, upon which there had been no direct attack. An order in a bankruptcy proceedings, from which appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. Nor may a party refrain from direct attack by motion to modify or by appeal from an order and later collaterally attack the same by an appeal from a later order, in which the court overrules an objection attempting to raise a question disposed of by the previous order. *In re Trust No. 2988*

> *of Foreman Trust & Savings Bank*, 7 Cir., 85 Fed. 2d 942. This court cannot, upon an appeal from the order of confirmation, review the order of classification previously entered."

(1-B) The decision of the Second Circuit is also in conflict with the decision of the Seventh Circuit in *In re Palisades-On-The-Desplaines*, 89 Fed. (2d) 214, where the question of placing separate mortgages on twenty-two different parcels in the same class was attacked. While there it arose under Sec. 77B (c, Sub. 6), the language of the statute is precisely the same as the present Sec. 197 of the Act, which provides:

> "For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock."

There the Seventh Circuit said that these twenty-two mortgages were properly classified in one class.

Here we have two first mortgages on adjoining properties, a part of one hotel unit. Of course no reason has been urged or assigned by Meyer why they should be placed in a different class because he never raised the point in the District Court. (When the classification order was made the District Court relied upon the above Seventh Circuit case.) Furthermore and very important is the fact that when the classification order was made Meyer was a proponent of the motion and could not possibly have been a party aggrieved to appeal from the classification order, even if he had so desired. We will discuss this further in Sub. 3 infra.

(1-C) The Circuit Court has also reversed the District Court on the question of the value of the bonds, stating in its opinion that—

> "* * * The court erred. For there was no hearing at which evidence was taken that supported that finding."

Meyer on this appeal, in his brief before the Circuit Court (P. 12) raised the point that:

> "No notice of any hearing to consider the question of such evaluation was given to bondholders. Many persons besides Dolan and Meyer are holders of these bonds. Furthermore, the court denied counsel for other holders of these bonds the right which he requested to file objections" (F. 470).

We must assume from Meyer's brief and the argument of his counsel on appeal that what the Circuit Court means is that the bondholders had no notice of such hearing. There certainly were hearings, at which all matters brought to the Court's attention, were thoroughly discussed, including evaluation of the bonds—in fact there were four such hearings, April 10, April 11, April 29 and May 10, 1944. No bondholders complained that they did not receive sufficient notice, nor did they ask to put in any proof; nor did Meyer. He merely objected to the amount of the Court's evaluation (F. 508). He was represented by—not one, but two—counsel, Messrs, Langan and Bragaw, at all hearings and was heard at length on every objection they raised. Practically all bondholders were represented at these hearings (F. 506). That point was not called to the attention of the District Court, and was raised by Meyer for the first time on appeal.

This decision of the Second Court is in direct conflict with *In re Waern Bldg. Corp.*, Seventh Circuit, 145 Fed. 2nd 584. There on appeal from an order of confirmation an objecting bondholder for the first time raised an objection which he

had not raised before the District Court. The Seventh Circuit said:

> "Appellant attempts to thrust this objection in as an afterthought on this appeal. If appellant wished to complain of this aspect of the plan, he should have raised a specific objection before the referee and the court in order to have permitted a finding as to its validity. Since he did not, the objection may not be raised for the first time in this court."

(1-D) Furthermore it now would seem that on appeal Meyer has claimed that "other" bondholders did not receive notice and hence he is entitled to appeal because those "other" bondholders did not receive such notice. (The fact is, they did receive notice. We will discuss that in Subdivision 3, infra.)

Assuming, but not conceding, that such "other" bondholders had not received notice, as claimed by Meyer, nevertheless he made no such objection before the District Court. Even if he had, it still would not have afforded him a right of appeal on that ground. The decision of the Second Circuit is in direct conflict with the holding of the Ninth Circuit in *In re Mason vs. Eldorado Irrigation District*, 144 Fed. 2nd 189, where the court said:

> "Appellant claims notice of hearing of the final decree was without due notice to the creditors, but does not claim any harm suffered by himself because of this asserted omission * * *. The proposition is without merit."

It is also in direct conflict with the holding of the decision of the Fourth Circuit in *Pullman Coach Co. v. Eshelman, et al.*, 1 Fed. (2d) 885, where it was held that—

> "The only purpose of the requirement that there should be a petition and notice to creditors is to give creditors opportunity to be heard * * *. That purpose was met when the objecting creditor at a legal meeting of creditors entered upon a consideration and discussion of compromise without objection of lack of petition or due notice."

Meyer is the only objecting creditor and he was fully heard—four times—April 10, 11, 29, and May 10, 1944. (The entire minutes of these proceedings are in the Record, fols. 340-522.)

True, at the hearing on April 29, 1944, counsel for certain bondholders appeared and desired to intervene and file objections to the plan (F. 470), presumably on the ground that the bondholders should receive more than 50% of the face value. They were allowed to intervene but not allowed to file objections. However, the matter again came on to be heard on May 10, 1944, and these same objecting bondholders were heard again. The District Court then ruled that because they were already represented by a Bondholders' Committee and had taken no steps to withdraw their bonds from that Committee and there being no showing that the Committee was not able or willing to protect their interests, the District Court would consider those bonds as being represented by counsel for the Bondholders' Committee (F. 501-2). No appeal was taken by those bondholders from that ruling.

The Circuit Court has also reversed the District Court on the ground that provision in full being made to Merchandise Brokerage Corp., an unsecured creditor, without the same provision being made to bondholders was "clearly wrong." The facts are that the Merchandise Brokerage Corp. has a claim of $4,600, based upon notes executed by the tenant of

Debtor and guaranteed or endorsed by Debtor for merchandise sold to the tenant, which under the lease existing between Debtor and tenant, became the property of Debtor upon delivery of the same to tenant (F. 570).

All other general unsecured creditors had previously been paid in full. All plans of reorganization, including those of Meyer and the bondholders, have provided for payment in full to the Merchandise Brokerage Corp. No point was ever brought to the attention of the District Court that this provision was in any way improper and for the first time it was raised by Meyer on this appeal.

The Circuit Court, now considering that issue for the first time on this appeal from the order of confirmation, is in direct conflict with the foregoing decisions of the Seventh Circuit in *In re Waern Bldg. Corp.*, supra.

Point may now be made by Meyer that this particular issue was raised in the objections filed by him on April 10, 1944 (F. 302-3). If so, the point was not brought to the Court's attention, nor that of opposing counsel. The matter came on to be heard again on Apr. 11, again on Apr. 29 and again on May 10, and at no time did Meyer raise that objection.

The minutes of the various hearings have all been printed in the record (F. 340-522). As pointed out by the Seventh Circuit in *Maloney v. Brandt*, 123 Fed. 2nd 779:

> "Litigants are not entitled to hide a point in an obscure pleading and present it for the first time on review, but they should fully and fairly acquaint the trial court with all matters relied on."

(1-E) The Second Circuit has held; in the instant case:

> "That the order of classification was entered when the present plan was not before the court." F. 681

(P. 37, infra)

The fact is that the Trustee's plan, dated April 7, 1943, (See Appendix) was before the District Court, and this plan, as amended, is the plan that was approved and confirmed (F. 239). However, assuming that that was not so, this decision is in direct conflict with the holding of the Fifth Circuit in *In re Texas Hotel Securities Corp.*, 87 Fed. 2nd 395, where the court said:

> "The proof of claim as to ownership, amount and nature should first be made, and after its allowance and classification its right to vote if challenged should be considered in connection with the approval of the plan."

Neither was this point ever brought to the attention of the District Court.

(1-F) The Second Circuit in the instant case has held that Meyer, after this transaction with the First Trust, was entitled to vote Dolan's "Participations." The theory being that the First Trust had made a "valid voluntary assignment" and that under the terms of the certificates—"such an assignment at once divested most of the certificate holders, including Dolan, of any interest in the mortgage."

In his opinion Judge Frank points out that Dolan's "Participations" contained the provision—"that the company (referring to the First Trust) may take up and cancel this certificate at any time upon payment of the amount of principal and interest due herein." That is the only possible provision under which such a claim could be made (F. 120-23). The fact is, the "company" did not then and never has taken up Dolan's participations or paid for them. However, in any event, this decision of the Second Circuit is in conflict with the decision of the Third Circuit in *Herbert v. Apartments Corp.*, 98 Fed. 2nd 662 (cert. den. 305 U. S. 640). There the rights of participation holders were thor-

oughly discussed. As in the present case, the mortgage certificate is carefully drawn to avoid creation of a fiduciary relationship and merely creates that of principal and agent. The Third Circuit held that the certificate holders were—

> "In fact the beneficial or true owners of the rights in the mortgage. * * * They were the creditors within the purview of section 207 of the act. * * * That the mortgage company could not file a claim on behalf of all certificate holders. It lacks such authority, since it acts merely as agent. * * *"

II.

The Second Circuit Court has decided the question of classification in a manner probably in conflict and inconsistent with applicable decisions of this Court.

In making its decision that classifying the two first mortgages in one class was erroneous, the Circuit Court cites *Group of Investors v. Milwaukee R. Co.*, 318 U. S. 523, 562, and *Ecker v. Western Pac. R. Corp.*, 318 U. S. 448, 482.

Neither of these cases hold arbitrarily that placing two first mortgages in the same class is erroneous. In fact, it would appear quite to the contrary. The issue, of course, was not directly raised in either of these cases, but this Court did say in the *Ecker* case:

> "The important element is the allocation of securities so as to preserve to creditors the advantages of their respective priorities. That is to say, senior claims first receive securities of a worth sufficient to cover their face and interest before junior claims receive anything."

In the *Group of Investors* case, this Court said:

> "No fixed rule supplies the method for bringing two divisional mortgages into a new capital structure so that each will retain in relation to the other the same position it formerly had in respect of assets and of earnings at various levels. The question in each case is one for the informed discretion of the Commission and the District Court. We cannot say that the discretion has been abused here."

Neither has that discretion been abused in the instant case. Under the plan confirmed, the holders of "Participations" are being paid all of their principal in cash and one-half of all past due interest in cash. The entire balance of unpaid interest is being provided for by preferred stock (F. 201)—thus in all—full provision is being made for "Participations" (the total of this preferred stock would be about $46,000). The position of their lien was not being subordinated because of this provision as to preferred stock. Much to the contrary, it was being substantially improved. This preferred stock received preference over common stock to be issued to Dolan for past due interest on his mortgage. It was also preferred as to dividends over Dolan's common stock and had equal voting rights (F. 203). At the same time, the mortgage on the "Annex" being discharged and that property becoming a free asset, this preferred stock continued to remain a first lien on the "Annex" just as it had been in the past, except as to current liabilities of the New Company. It also became a lien on all the rest of the Debtor's assets.

Furthermore, the provisions with regard to this preferred stock were agreed upon by the holders of practically all "Participations" on March 18, 1944, at the time the plan was considered for approval (F. 271, 360).

The objections now made by Meyer arise solely because he seeks to place himself in the position of these "Participation" holders through the above recited transaction with the First Trust on April 1, 1944, when the plan was to come up for confirmation.

III.

The Second Circuit has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

The Circuit Court's reversals of the District Court are almost entirely on issues which were never raised or brought to the attention of the District Court, to-wit:

(A) The "lumping" together of the two first mortgages in one class.

(B) That the classification order was entered when the present plan was not before the Court. (The facts are to the contrary. The present plan, as amended, was before the Court) (F. 239).

(C) That because of the alleged erroneous classification, Meyer, through his maneuver with the First Trust, was entitled to vote Dolan's "Participations."

(D) That no hearing was had to evaluate the Bonds.

(E) That "other" Bondholders had no notice of the hearing with reference to evaluation of the Bonds.

(G) That the claim of the Merchandise Brokerage Corp. was not entitled to full provision without the same provision being made for Bondholders.

In considering on appeal for the first time issues not raised or brought to the attention of the District Court, the Circuit Court has departed from the accepted and usual course of judicial procedure.

3-A & B. As pointed out above, when the classification order was made on April 26, 1943, Meyer was in favor of the classification as made by the Court—not against it. At that time Meyer was for it because he was a proponent with the Onondaga Savings Bank (Dolan's predecessor in title) of the Trustee's plan dated April 7, 1943 (see Appendix). Meyer never claimed before the District Court that the mortgages should be separately classified, or that the "Participations" be refused a vote. That being what he desired at the time, naturally he was satisfied. No appeal having been taken, it became the law of the case.

A year later (March 18, 1944), the Trustee's plan was approved. Then on April 1, 1944, Meyer (after futile attempts to buy the first mortgage from the First Trust (F. 398)), made this demand, which everyone now, even the Circuit Court, concedes was a "nullity," and procured the instrument which conditionally assigned to him the mortgage owned by the "Participation" holders (F. 82).

3-C. He claims on appeal that said classification order and the order vesting power to vote in the "Participation" holders, to which he consented, if he did not request, was erroneous. The point was not made before the District Court. Both Meyer and the First Trust were parties to that proceeding. Obviously they were both satisfied with the District Court's classification. Meyer was in no way

misled or deceived. He made his demand on the First Trust for an assignment of the mortgage clearly on the theory that if he could vote that mortgage, it being in the same class with Dolan's mortgage, he could block the confirmation. Hence at the hearings on confirmation Meyer did not desire separate classification but, rather, desired a classification exactly as it was made.

Now, on appeal from the confirmation, he attacks the classification order for the first time. We believe the Circuit Court, in permitting Meyer to attack this classification, to which he not only acquiesced but was a proponent, has radically departed from the accepted and usual course of judicial procedure.

3-D. The Circuit Court has also reversed the District Court on the ground that no hearing was had at which evidence was taken to support the District Court's finding that 50% of the face value of the bonds was a fair value.

In the first place, the plan originally filed by the Trustee and sponsored by Meyer, made provision for only 25% of the face value in cash (p. ~~12 of~~ Trustee's plan in Appendix) 47, infra Through amendments offered by Dolan the provision was increased to 50% of their face value, together with the right to subscribe for common stock (F. 248, 205, 208). Meyer made the same proposal. The Bondholders' Committee, in its plan, was content with that valuation (F. 271, 147, 317) and on the eve of the approval of the plan this committee entered into an agreement to sell the bonds held by it to Meyer for 50% of their face value (F. 262). No one complained and even Meyer, at the time the plan was considered for approval, agreed that 50% of the face value was fair and equitable.

The District Court's valuation of the bonds was based, not only on the evidence in the solvency trial (in which

Meyer and the Bondholders' Committee participated), held just prior to confirmation of the plan, but upon considerable other evidence, including the plans of Meyer and the Bondholders' Committee (F. 317). Fifty dollars was their "goal" (F. 272). The Circuit Court said that: F. 686

> "The lower Court intimated that Meyer was in some way estopped because he had previously been ready to acquiesce in a plan alloting only 50 in cash to these bonds * * *. For the record indicates that Meyer was proposing a plan which would yield these bonds not only 50 in cash but a portion of that part of the new common stock * * *."

The proposals of both Meyer and Dolan accorded substantially the same treatment to Bondholders—$50 in cash and the right to buy common stock (F. 270). What the District Court meant was that Meyer should be satisfied to accept the same proposition that he was representing to the Court was "fair and equitable" in his proposals (F. 269, 272).

The District Court's opinion approving the plan said, among other things:

> "If upon presentation a majority of only one class fail to accept, I shall be inclined to make findings which can be readily found upon the evidence taken in the so-called insolvency hearing and the records in this case" (F. 272).

That opinion, together with notice of a hearing on confirmation, was mailed to all bondholders on March 25, 1944 (F. 273). That notice called a hearing for April 10, 1944. Because of a technical objection of Meyer (that Sec. 179 of the Act had not been complied with in that the date for

consideration of confirmation had been noticed prior to the time fixed for filing of acceptances) (F. 310, 343), the District Court directed that a second notice to the same effect be mailed on April 15, 1944, calling for a hearing on the confirmation for April 29, 1944. At both of these hearings practically all Bondholders were represented (F. 506).

If anyone had even suggested that Bondholders were entitled to additional notice, most certainly the District Court would have granted that additional time. The District Court was particular to avoid the possibility of any technical objections on appeal and noticed the matter for the second time because of Meyer's objection to non-compliance with Sec. 175 (F. 310, 343, 415). Bondholders did receive notice of what would be done. First, in the plan (F. 209); second, in the order mailed to them (F. 244); and third, in the opinion mailed to them (F. 273). These were mailed to them on two separate occasions; once on Mar. 25, 1944, calling the hearing for Apr. 10, and again on ~~Mar.~~ Apr. 15, 1944, calling the hearing for Apr. 29 (F. 310, 623). These notices also contained a provision that the hearing would be adjourned from time to time without further notice other than by the announcement of the adjourned date (F. 251). Hence they were all apprized of the hearing May 10, 1944.

When confirmation of the plan was being considered and the Court made its finding on the issue, Meyer merely took exception to that finding (F. 508); he did not complain that he had no notice of a hearing on the question, nor that he be permitted to introduce more evidence. Now on appeal from the order of confirmation he urges that he should have been permitted to put in more evidence and the Circuit Court has agreed with him.

The consideration by the Circuit Court of this issue, not raised before the District Court, is a departure from the accepted and usual course of judicial procedure. It has long

been a rule of practice that a reviewing court may not consider errors not called to the attention of the lower court where such matters do not concern the jurisdiction of the court. It would be manifestly unfair to hold that the District Court had erred in a matter it had not considered. This should apply here even more because Meyer had had four distinct opportunities to raise this issue because the confirmation was before the District Court on four separate days—April 10th, 11th, 29th and May 10th. Meyer was represented by two counsel and heard at length and at no time did he claim he needed more notice and desired to put in more evidence.

(3-F) This is also true with regard to the reversal by the Circuit Court of the District Court's order of confirmation on the ground that the plan made full provision for the Merchandise Brokerage Corp. No such issue was raised by Meyer at any of the hearings on confirmation and he certainly had ample opportunity to do so.

IV.

The Circuit Court has decided important questions of Federal Bankruptcy Law which have not been, but should be, settled by this Court, and many of these questions are both novel and important.

1. Is the "lumping" together of the two first mortgages in one class illegal?

2. Must an order of classification be made at a time when a plan of reorganization is before the court?

3. May the validity of a classification order previously made be challenged on an appeal from an order of confirmation?

4. Is a plan unfair and illegal if creditors in the same class receive different treatment, even though there is no violation of the priority rule, particularly when the objecting creditor is receiving better treatment than other creditors?

Here Meyer complains that Dolan on his mortgage was receiving different treatment than the "Participations." Dolan's mortgage merely remained a lien exactly as at present as to principal. The principal of the "Participation" mortgage was being paid off in cash. For the past due interest on Dolan's mortgage he was to receive common stock. For the past due interest on the "Participation" mortgage the holders were to receive one-half of the past due interest in cash, the other half in preferred stock which in all respects was a prior lien to common stock and had equal voting privileges. Thus the "Participations" were receiving better treatment than Dolan's mortgage. (F. 200-12)

5. "Participation" holders admittedly are creditors within the meaning of Sec. 107 of the Act. Upon the commencement of a reorganization proceeding does the original issuer of "Participations" have any rights in the proceeding because of any provisions contained in the certificates, particularly after the holder has filed his claim and it has been allowed. Can that issuer exercise any powers or privileges contained in the certificate after the filing of a petition in bankruptcy and the filing of a claim by the "Participation" holder?

The Second Circuit in *In re Castle Apartments, Inc.*, 113 Fed. (2d) 762, has said that the issuer of such participations would not have a right to vote even if "they as trustees have been given all the rights of an absolute owner under a declaratory trust."

Again, the Second Circuit in *In re Blinrig Corp.*, 114 Fed. (2d) 100, held that the issuer of such "participations" could not block the acceptance of a plan, even if the issuer was—"vested with all the rights and powers of an absolute owner of the property."

6. Does such "participation" holder have a vested property right in his participation upon the commencement of bankruptcy proceedings of which he cannot be divested without his consent? Can the issuer of the participation say—"John Doe has given me the amount due on your claim. Give John Doe your claim"?

7. Does not that participation holder have a property right in that participation which, because of other interests he may have in the proceeding, attach a value to his participation far in excess of its face value?

8. If two parties in a bankruptcy proceeding enter into a transaction and agree that it shall be subject to the approval of the court as to legality and propriety, does the court become the final arbitrator and does an appeal lie in favor of the party who is dissatisfied with the court's decision?

9. The Second Circuit held in the instant case: F. 684

> "There can be no bad faith in buying up claims in order to frustrate the obtaining of acceptances from members of a class invalidly constituted."

Is bad faith in buying up claims to be permitted in such a case?

10. Can a creditor who was present at a hearing appeal on the ground that "other" creditors received no notice and were not heard, particularly when he had not raised that objection before the lower court?

11. Section 180 provides:

> "The order of the judge approving the plan * * * shall not affect the right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan."

Does this mean that a creditor who had filed objections and been fully heard at the time the plan was considered for approval and had not appealed from the order of approval, is entitled to file different objections at the hearing on confirmation and then appeal from an adverse decision?

12. Can a creditor who was fully heard and consented to approval of the plan later sell his claim to a third party and place that third party in position through the ownership of that claim to raise objections to the confirmation of a plan which his predecessor in title had approved.

In the instant case, the First Trust on the approval of the plan on Mar. 18, 1944, was fully in accord with Dolan (F. 271, 360). On Apr. 1, 1944, the transaction with Meyer took place and on Apr. 10, 1944, Meyer, claiming to be the owner of the First Trust mortgage, raised entirely new objections to the confirmation (F. 392-304).

V.

The decision of the Circuit Court is palpably erroneous on its face.

If Meyer did not effectively acquire the First Trust mortgage through the assignment from the First Trust then the whole basis of the Circuit Court decision fails. Prefacing the opinion of Judge Frank the Circuit Court recites that on Apr. 1, 1944, the demand was made on the First Trust for an assignment of the mortgage to Meyer under Sec. 275 of

the New York Real Property Law; the tender by Meyer to the First Trust of the balance due on the mortgage; the execution of the assignment and quotes the provision thereof;

> "that the question of whether or not acceptance of such payment and the giving of this assignment is proper and legal under all circumstances be presented for determination to (the District Court) * * * on or before May 1, 1944 * * * and the assignment shall be void and of no effect if the court determines the giving thereof improper and unlawful by reason of violating the rights of any participation holders or otherwise * * *"

That on Apr. 6, 1944, the First Trust filed its petition, referring to the demand, tender and assignment and asking the District Court for a determination; that the District Court held the demand was a "nullity"; that the First Trust was not compelled to assign; that an order was made among other things providing:

> "* * * SECOND: That the First Trust & Deposit Company was not obligated to comply therewith and that the assignment of the mortgage given by the above-named debtor, The Onondaga Hotel Corporation, dated December 21, 1928, and recorded in the Onondaga County Clerk's Office December 27, 1928, must be considered a voluntary sale and not one in compliance with the aforesaid demand. THIRD: That this Court, subject to the provisions in Paragraph 'FIFTH' thereof, makes no disapproval of the assignment of said mortgage as a voluntary act and, subject to the provisions in Paragraph 'FIFTH' hereof, consents thereto. FOURTH: That the acceptance of all participation certificate holders—which have been filed prior to this hearing

> —be deemed to have been filed as of April 5, 1944. FIFTH: That the approval given by this Court to said assignment as hereinbefore set forth does not and shall not deprive owners of participation certificates, who had not on April 10th, 1944, been paid nor had payment tendered to them for their certificates with interest, of their right to vote upon or participate in the plan presented by T. Frank Dolan, Jr., under date of February 24, 1944, which plan is now before this Court for confirmation."

In his opinion Judge Frank says: F 683

> "Meyer effectively acquired that mortgage through his purchase and the assignment thereof on April 1, 1944. * * * For, as the court below said, the First Trust made a valid voluntary assignment; * * * True, the assignment was conditional; but, since the court below correctly held that that condition was satisfied, it should have held the assignment effective as of April 1, 1944, the day it was executed."

First, the District Court did not hold that it was a "voluntary" assignment. What it did hold is that it made no disapproval of the assignment and consented thereto "provided" that it did not deprive the owners of the participations who, on April 10, 1944, had not been paid nor had payment tendered to them, of their right to vote upon and participate in the plan (F. 196).

Admittedly the assignment was conditional and predicated upon the very proposition that it should not violate the rights of any "Participation" holders (F. 85). Likewise, the decision of the District Court specifically states that it made no disapproval of the assignment "provided it should

not deprive the owners of 'Participations' * * * of their right to vote" (F. 197).

Sec. 198 provides:

> "An indenture trustee may file claims for all holders * * * of securities issued pursuant to the instrument under which he is trustee, who have not filed claims; provided, however, that in computing the majority necessary for acceptance of the plan, only the claims filed by the holders thereof, and allowed, shall be included."

The First Trust was either an agent or a trustee. If it was an agent, it had only the rights specified in the "Participations"; if it was a trustee it was bound by the above provision, and Meyer, by obtaining the assignment, could be in no better position than the First Trust was.

Judge Frank in his opinion says: F. 683

> "Under the terms of the certificates, such an assignment at once divested * * * Dolan of any interest in the mortgage."

Neither the assignment, the certificate, nor the mortgage extends any such power to the First Trust—least of all to Meyer, a third party. The "Participations" are absolute assignments of undivided shares in the mortgage (F. 120). The right "to take up and cancel" is one thing—the right to divest a "Participation" holder of his interest in the mortgage is another. Even so, on Apr. 10, 1944, the day fixed for voting, the "Participations" had not been taken up and cancelled (F. 169). Dolan's right to vote his claim, based on his "Participations," was not affected by the transaction.

VI.

The Bankruptcy Act and the general principles of equity jurisprudence have been so construed and applied by the Circuit Court as to permit a miscarriage of justice.

Dolan was not a party to the deal between Meyer and the First Trust, but his rights were being seriously affected. He owned a share in that mortgage, which, together with his other holdings, aggregated in excess of the two-thirds necessary to put through the approved plan. He was not interested in mere payment of the amount due on his share. He was more interested in the voting rights to which it was entitled. Neither Meyer, nor any third party, had a right to divest him of that vested right by merely paying the face amount of his share to some other person and saying—"I gave the First Trust the amount of your claim and I'm going to vote it against you." No law or equity extends such privilege, nor does the mortgage "Participations." The District Court knew this. To hold otherwise would have deprived Dolan of his property without due process of law. Meyer was attempting to acquire the whole mortgage for the sole purpose of voting—the very same reason why Dolan had previously acquired his "Participations" in that mortgage.

Is there any equitable reason why Meyer should be permitted to capitalize on Dolan's investment; is it fair or equitable for Meyer to say that he is entitled to the benefits of Dolan's purchase of "Participations" in January, 1944, any more than Dolan should be permitted to claim that he is entitled to vote the various securities purchased by Meyer from time to time in these proceedings?

Admittedly, the First Trust had no vote as issuer of these "Participations," then on what theory is Meyer entitled

to vote if he finds himself an assignee of whatever interest the First Trust had?

Let us assume that Dolan owns 100 shares of preferred stock in a corporation, callable at par at any time. A meeting of stockholders is called. Meyer goes to the corporation and says: "I want to vote Dolan's stock at this meeting. Here is the callable price of his stock." The corporation says: "Dolan has voting rights, and we are in doubt as to the legality and propriety of your demand. We will let the District Court decide it." The decision is put up to the Court on the day of the meeting. The Court rules: "Whatever you do with Meyer you do not affect Dolan's right to vote at this meeting." No one will dispute but that such a ruling would be correct. The transaction at bar is similar, assuming, without admitting, that in view of these reorganization proceedings the First Trust had the right to "take up and cancel" the "certificates" (F. 123). Dolan's certificates are still outstanding and have not been taken up or canceled (F. 169).

The First Trust did not purport to "sell" the mortgage to Meyer. It was so stated to the District Court by counsel for the First Trust, who drew the assignment (F. 357, 388). The assignment itself clearly points out that it was merely complying with the demand made by Meyer under Sec. 275 of the New York Real Property Law. There is no language in the assignment which indicates that it was in any way a "sale" (F. 83). To the contrary, it clearly indicates that it was an involuntary act on the part of the First Trust and both its legality and propriety were left to the decision of the District Court (F. 85).

The legality and propriety came on to be heard by the District Court on April 10, 1944, at the same time as the hearing on confirmation. The transaction, by its very

terms, could not have been consummated prior to April 10, 1944.

In its application to consider the matter the First Trust merely recited the bare facts and stated—"Petitioner desires and applies for a determination of the matters and questions which such conditions provide shall be presented to and determined by this Court." The First Trust did not say—"This is what we want to do," well knowing that if it did it would have violated Dolan's rights as a "Participation" holder.

This move of Meyer was not to protect any interests he had in the proceedings but, rather, to block Dolan's plan (F. 391). At that time Meyer's only holdings were 53 bonds and 1,700 shares of stock (F. 533-37). The stock had been eliminated by a previous determination of insolvency (affirmed by Circuit Court Dec. 11, 1944). As to the bonds, his plan provided for payment of 50% of the face value and rights to subscribe to stock the same as Dolan's plan. What was fair and equitable for all bondholders on March 18, 1944, should certainly be considered fair and equitable on April 10, 1944, particularly by Meyer. That is what the District Court had in mind when it said Meyer's position was "inconsistent" (F. 508).

At the time the plan was up for approval everyone was in substantial accord with Dolan's proposals, except, of course, Meyer (F. 271).

Meyer accepted the assignment, knowing that the District Court was to be the arbitrator. He was not satisfied with the decision of the arbitrator and therefore appealed. Counsel for the First Trust understood that the decision of the District Court was final and that no appeal would lie therefrom (F. 391).

The District Court had the right to take into consideration, not only the legal rights, but also the equitable rights of the parties. The District Court had the right to assume that third parties might buy securities involved in these proceedings and that those parties would be buying those securities with such rights as might be fixed by the court from time to time in the proceedings. Thus, on Mar. 18, 1944, when the District Court approved the amendments to the Trustee's plan proposed by Dolan and disapproved those proposed by Meyer, it was clear to Meyer that Dolan would be in position to vote his plan through. To block Dolan, Meyer grasped at the only remaining straw—to compel the First Trust to give him some kind of an instrument upon which he could make some claim. Hence the demand on the First Trust and the assignment of the mortgage. Obviously, Meyer could not buy Dolan's "Participations", at least, not for face value, and it is improbable that prior to Apr. 10, 1944, he would be able to buy very many of the other "Participations." He needed the vote of all of them by Apr. 10, 1944. He therefore made this demand on the First Trust which now everyone concedes was an illegal act and this the Circuit Court has passed over, saying—

> "We need not consider the validity of the demand * * *." F. 683

In other words, the ends justified the means even though the means admittedly was illegal.

What, in effect, the Circuit Court has done is to grant to Meyer the right to vote claims in bankruptcy owned by Dolan. The Circuit Court has held that Meyer could divest Dolan of his interest in the mortgage without his consent. It has granted to Meyer the right to vote the mortgage by virtue of this assignment from the First Trust when even admittedly the First Trust had no such vote. The Bank-

ruptcy Act and the general principles of jurisprudence have been so construed and applied by the Circuit Court as to permit a miscarriage of justice.

VII.

This petition for writ of certiorari should be granted.

Respectfully submitted,

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